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NO. 84-894

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

STATE OF ILLINOIS
Petitioner,
vs.
THOMAS FOGEL,
Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE APPELLATE
COURT OF ILLINOIS, FIRST DISTRICT

PETITIONER'S REPLY BRIEF ON THE ISSUE OF CERTIORARI

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I.

THE PENDING CASTLEBERRY AND CARNEY DECISIONS OF THIS COURT BOTH INVOLVE THE QUESTION OF WHETHER THE AUTOMOBILE EXCEPTION TO THE SEARCH WARRANT REQUIREMENT APPLIES TO A PARKED VEHICLE.

In the petition for a writ of certiorari petitioner noted that the issue

in this case is also involved in Castleberry matter, now pending before this Court. Oklahoma v. Castleberry, cert. granted, 105 S.Ct. 379 (Nov. 5, 1984) (No. 83-2126). Respondent has denied this. But in fact one of the questions in Castleberry is whether the automobile exception to the search warrant requirement applies to the search of parked and vacant vehicle.

It is true that the principal issue in Castleberry is whether a warrant was necessary to search certain containers recovered from the truck of a parked automobile. But to even reach that issue, it must first be decided whether the police officers had a right to search the parked vehicle at all. If the search of the automobile in Castleberry was legal, then the search of the automobile in this matter was legal.

It should also be noted that a search of a parked vehicle is at issue in the Carney matter, which has already been briefed and argued before this Court. California v. Carney, cert. granted, 104 S.Ct. 1589 (March 19, 1984)(No. 83-859). Carney involves the question of whether the automobile exception to the search warrant requirement applies to the search of a mobile home. But this Court's decision in that matter will shed light on the extent to which that exception applies to a parked vehicle.

At present the decisions of this Court do not make it clear to what extent the automobile exception to the search warrant requirement applies to a a parked and vacant vehicle standing on private property. It is true that a warrantless exterior search was upheld in the Caldwell decision and that a warrantless search of

an abandoned vehicle was sustained in the Cady matter. Caldwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974); Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). On the other hand, a warrantless search of a vacant vehicle was ruled to be unconstitutional in the Coolidge case. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). In the pending Castleberry and Carney matters this Court will clarify the scope of the automobile exception to the search warrant requirement. It may then be possible to give this case a summary disposition. But some form of review should be granted in this matter, since it involves an important question which has not yet been fully resolved by this Court.

II.

THE QUESTION OF PROBABLE CAUSE IS IRRELEVANT TO THIS CASE, SINCE IT WAS NEVER CONSIDERED OR DECIDED BY THE COURT BELOW.

Respondent argues that the police lacked probable cause to search his automobile. That argument is a red herring, having nothing to do with the issues in this case. The question of probable cause is not before this Court, since it was never considered or decided by the Appellate Court of Illinois. In fact, the decision of the Appellate Court of Illinois assumed that the police officers had probable cause to believe that there was contraband to be found in respondent's automobile.

The decision of the Appellate Court of Illinois, holding that the search of respondent's automobile was unlawful, was based solely on the fact that the police failed to obtain a search warrant for the car. That court said:

> And there was no indication that obtaining another search warrant would have been particularly impractical for the police. Thus, the circumstances were not so extreme as to justify the police in effectively eliminating the search warrant requirement, and thereby usurping the judicial function of determining whether probable cause existed to search the automobile. (Petition, Appendix I, pp. 8a-9a)

At no point in its opinion does the Appellate Court of Illinois consider the question of probable cause or rule on

whether probable cause existed, so that question is not before this Court. This Court will ordinarily rule only on questions which have been decided by the court below. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); Tacon v. Arizona, 410 U.S. 351, 93 S.Ct. 998, 35 L.Ed.2d 346 (1973). Thus there would be no need for this Court to consider the issue of probable cause if review is granted in this matter. Respondent's arguments concerning probable cause therefore have nothing to do with the question of whether certiorari should be granted in this case.

The Appellate Court of Illinois held that a warrant is necessary to search a parked and vacant car, and that the automobile exception to the search warrant requirement does not apply to such cases. This holding was based on that court's

interpretation of federal constitutional law, since the Coolidge and Cady decisions of this Court were cited in support of it. Cady v. Dombrowksi, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973); Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). This Court should correct this erroneous ruling, and may choose do so either through a summary disposition or through a remand for further consideration in the light this Court's pending decisions in the Carney and Castleberry matters. California v. Carney (No. 83-859, pending); Oklahoma v. Castleberry (No. 83-2126 pending). The question of probable cause may be left to further proceedings after remand.

In conclusion, the question of probable cause to search was never decided by the court below. Therefore, it is not involved in this case, and the sole ques-

tion before this Court is whether the automobile exception to the search warrant requirement applies to a parked and vacant vehicle.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, petitioner, the State of Illinois, respectfully prays that a writ of certiorari issue to review the judgment and opinion entered in this matter by the Appellate Court of Illinois, First District.

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